

The Central Law Journal.*ST. LOUIS, SEPTEMBER 9, 1881.***CURRENT TOPICS.**

A novel case was recently decided by the Supreme Court of Michigan, to which we can remember no parallel. A physician was engaged to attend in a professional capacity upon a poor married woman, confined in child-bed. The night was dark and stormy, and the roads over which he had to travel, were so bad as to be impassable, except upon foot. The doctor, De May, was sick and much fatigued from over-work, and, therefore, asked his co-defendant, Scattergood, who was a young unmarried man, and neither a physician nor a student to go with him and carry a lantern, an umbrella and some instruments, and he accompanied him with great reluctance. There was but one room in the house. While the defendants were there, both of them behaved in a proper and becoming manner, as if actuated by a sense of duty and kindness. The answer, after raising the general issue, pleaded that admitting the facts to be true as alleged by plaintiff, she was not entitled to recover. After reviewing the facts the court say: "Dr. DeMay therefore took an unprofessional young unmarried man with him, introduced and permitted him to remain in the house of the plaintiff, when it was apparent that he could hear at least, if not see all that was said and done, and as the jury must have found, under the instructions given, without either the plaintiff or her husband having any knowledge or reason to believe the true character of such third party. It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one, and no one had a right to intrude, unless invited, or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time, she consented to the presence of Scattergood,

supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances, without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true character of the defendants."

LEGISLATIVE JOURNALS AS EVIDENCE.

Many limitations on legislative power are to be found in all those State Constitutions which have recently been adopted. This is the natural sequence of those abuses which had crept into legislation, and shows that the people have lost confidence in their law-makers. Many of these Constitutions, those of Missouri and Illinois, for instance, are filled with what had theretofore been within the domain of ordinary legislation. The manner of enacting laws is restricted in numerous ways, and these new fundamental requirements have brought into prominence the records of legislative assemblies as evidence of the constitutionality of statutes.

The mode of procedure in authenticating laws is about the same in all our legislative bodies. A bill, having passed both houses, is reported by a committee as properly enrolled; this enrolled bill is signed by the presiding officers of both houses, and then by the chief executive of the State. It is then transmitted to the secretary of State, who is thereafter its proper custodian. This, for convenience, may be called the statute roll. In England the public acts of Parliament, after they have received the royal assent, are transcribed upon parchment rolls, certified by the clerk of Parliament, and deposited in the rolls office. The original acts are retained in the custody of Parliament. In Great Britain there is no written fundamental law defining and limiting the powers of the government, by which the validity of the acts of the departments may be tested. The Parliament is, in a political and legislative sense, omnipotent

and supreme. There can be no such thing as passing a law by Parliament in an unconstitutional manner. The rolls, when certified as above described, and deposited in chancery, are, therefore, conclusive evidence of the due enactment of the statutes contained in them, and can not be impeached in any manner whatever. The leading English case is *Rex v. Arundel*,¹ in which there was an attempt at the trial in the court of chancery to show by the journal of the House of Lords that the proviso of a certain bill, which was omitted in the copy filed, had been passed as a part of the bill; and the question was on the admissibility of the journal to impeach the bill on the files. It was held that the journal could not be used for that purpose—that the journals of Parliament are not records, and can not weaken or control the statute roll, which is a record, and to be tried only by itself.

As a rule, the earlier American cases follow this precedent, and Judge Scott, in *Pacific R. Co. v. The Governor*,² says: "In our investigation we have not met with a single case in which the courts have looked behind the statute roll in order to determine whether in passing a law the members of the legislature conformed their conduct to the rules directed by the Constitution to be observed in framing laws." But it will be hereafter shown that the learned judge was wrong in supposing that there was no authority for the opposite position, as the Supreme Courts of several States had, even at that time, held differently. But he was afterwards approved and fully sustained in *Sherman v. Story*,³ where it was held that neither the journals of the legislature, nor the bill as originally introduced, nor the amendments attached to it, nor parol evidence, can be received to show that an act of the legislature, properly enrolled, authenticated and deposited with the secretary of State, did not become a law in accordance with the prescribed forms; that the authenticated statute roll in the office of the secretary of State was conclusive evidence of the passage of the act, and that it passed as enrolled.⁴

The same rule prevails in New Jersey,⁵ and

¹ Hobart's Rep. 110.

² 23 Mo. 362.

³ 30 Cal. 253.

⁴ *Fowler v. Pierce*, 2 Cal. 165.

⁵ *Pangborn v. Young*, 3 Vroom, 29.

in Maryland.⁶ In *Duncombe v. Prindle*,⁷ the court says: "This enrolled bill, thus filed and preserved in the secretary's office, is the authenticated copy of the real bill which the General Assembly passed, and is the ultimate proof of the true expression of the legislative will. * * * Behind this it is impossible for any court to go for the purpose of ascertaining what the law is." And in Connecticut it is held that the copy of the revised statutes, deposited with the secretary of State under his seal, has the same force as the original records, and imports absolute verity.⁸ So in Mississippi a majority of the court held that the statute rolls are conclusive evidence of the due enactment of the statutes contained in them, and can not be impeached by the journals or otherwise.⁹ And this is the law in North Carolina.¹⁰ In New York the question does not seem to be entirely settled. There are numerous New York cases in which the courts have gone behind the statute roll and investigated the journals, but the case of *People v. Devlin*,¹¹ is clearly against allowing the statute roll to be impeached in any manner.¹²

The doctrine of *Rex v. Arundel*,¹³ seems to obtain for the most part in those States wherein there is less of limitation upon legislative power than appears in the later Constitutions, and it is evident that such a rule can not stand under a fundamental law such as the State of Missouri now has, nor under any one having such a tendency to restrict the powers of General Assemblies. A few extracts from the Missouri Constitution may be given to show in what manner legislative proceedings are regulated: "Every bill shall be read on three different days in each house." "No bill shall contain more than one subject, which shall be clearly expressed in its title." "No bill shall become a law, unless on its final passage the vote be taken by yeas and nays and entered on the journal."

⁶ *Fouke v. Fleming*, 13 Md. 412.

⁷ 12 Iowa, 1.

⁸ *Eld. v. Gorham*, 20 Conn. 8.

⁹ *Green v. Weller*, 32 Miss. 650.

¹⁰ *Brodnax v. Groom*, 64 N. C. 244.

¹¹ 33 N. Y. 269.

¹² *People v. Commrs. of Marlborough*, 54 N. Y. 276; *People v. Purdy*, 2 Hill, 31; s. c., 4 Hill, 384; *DeBow v. People*, 1 Den. 9; *Commercial Bank v. Sparrow*, 2 Den. 97; *People v. Devlin*, 33 N. Y. 269; *Thomas v. Dakin*, 22 Wend. 9; *Warner v. Beers*, 23 Wend. 103; *People v. Supervisors*, 8 N. Y. 317.

¹³ *Supra*.

Where there are such constitutional provisions, it may be stated generally that those which require the observance of certain formalities are equally imperative with those which withdraw certain topics altogether from ordinary legislation, and that it is competent in the one case, as well as in the other, for courts of law to set aside statutes for unconstitutionality.¹⁴ Judge Cooley says: "The journals of each house are public records; if it should appear from them that any act did not receive the requisite majority, or, that in respect to it the legislature did not follow any requirement of the Constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence and adjudge the statute void."¹⁵

The first case I have been able to discover, in which the court looked into the journals of the legislature to ascertain whether an act did, in fact, receive the requisite number of votes to pass it, is *State v. McBride*,¹⁶ which was decided in 1836; but it was substantially overruled by Judge Scott in *Pacific R. Co. v. Governor*, above cited, which was in turn overruled in *Bradley v. West*,¹⁷ and *State v. Mead*.¹⁸ However, it was followed by the Supreme Court of Illinois in *Spangler v. Jacoby*,¹⁹ which case places the journals and the statute roll of the secretary of State's office on an equal footing as evidence; but this was afterwards modified in *Ryler v. Wren*,²⁰ where it was held that the courts would not take judicial notice of the contents of the legislative journals, but would of the statute rolls; and that if parties wished to raise a question as to whether the yeas and nays were called upon the passage of a bill, it was not sufficient to refer the court to the journal and expect the judges to explore it for the purpose of ascertaining these facts. The doctrine is well settled in that State that courts may look behind the statute rolls into the legislative journals and records, to see if

the Constitution has been complied with in the passage of laws.²¹

In Indiana the decisions are conflicting. In the early cases it was held that the courts might resort to the journals for evidence as to the proper passage of statutes;²² and in *Wright v. Defrees*,²³ it was held that the journals of the General Assembly can not be contradicted or impeached on the ground of fraud or mistake—they are conclusive evidence of the facts which appear on their face. But in the later case of *Evans v. Browne*,²⁴ these decisions were overruled, and it was held that the statute roll was conclusive, and that courts could not go behind it, to the journals or elsewhere. The possibility of overturning the statute roll by the journal prevails in Arkansas,²⁵ and in Alabama, Ohio, Nebraska, New Hampshire, Pennsylvania, Michigan, Minnesota, South Carolina and Kansas.²⁶

In *People v. Mahaney*,²⁷ there was an attempt at the *reductio ad absurdum*—to have the court declare an act of the legislature invalid, because a portion of the members who voted for it, and whose votes were necessary to carry it, were not legally elected members of that body. But the court would not inquire into this matter, and held that they could go as far as the journals and no further, to ascertain whether an act had been passed in accordance with the Constitution. The Kansas case cited²⁸ holds, that the signatures of the presiding officers of the two houses are only a part of the evidence of the due passage of the bill. "Courts must decide as to the passage and validity of a bill upon the whole of the legal evidence applicable to such a case. If the enrolled bill were perfect and

²² *Skinner v. Deming*, 2 Ind. 558; *McCulloch v. State*, 11 Ind. 424.

²³ 8 Ind. 298.

²⁴ 30 Ind. 514.

²⁵ *Burr v. Ross*, 19 Ark. 250; *English v. Olive*, 28 Ark. 321; *Knox v. Vinsant*, 27 Ark. 278-9; *State v. Little Rock, etc.*, 31 Ark. 716.

²⁶ *Miller v. State*, 3 Ohio St. 475; *Trustees v. McCoughy*, 2 Ohio St. 152; *Jones v. Hutchison*, 43 Ala. 721; *Hall v. Miller*, 4 Neb. 509; *Cottrell v. State*, 9 Neb. 125; *Opinion of Justices*, 52 N. H. 622; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446; *Green v. Graves*, 1 Doug. (Mich.) 351; *Hurlburt v. Britain*, 2 Doug. 191; *People v. Mahaney*, 13 Mich. 481; *Supervisors v. Heenan*, 2 Minn. 330; *State v. Platt*, 2 S. C. 150; *Board v. Higginbotham*, 3 Cent. L. J. (Kas.) 738.

²⁷ *Supra*.

²⁸ *Board v. Higginbotham*, 3 Cent. L. J. 738.

¹⁴ *Cushing L. & P. of Leg. Assem.*, sec. 2405.

¹⁵ *Constitutional Limitations*, 135.

¹⁶ 4 Mo. 303.

¹⁷ 60 Mo. 33.

¹⁸ 71 Mo. 266.

¹⁹ 14 Ill. 297.

²⁰ 43 Ill. 77.

²¹ *Prescott v. Canal Co.*, 19 Ill. 324; *Supervisors v. People*, 25 Ill. 181; *People v. Starne*, 35 Ill. 121; *Ryan v. Lynch*, 68 Ill. 160; *Miller v. Goodwin*, 7 Chl. Leg. News, 294.

formal in every particular, then the courts might say that the bill had passed and become a law, although there might be omissions from the journals; or if the journals showed that the bill had been regularly passed, then the courts might say the bill had become a law, although there might be some omissions from the enrolled bill. The enrolled bills and the journals are the principal evidences of the passage and validity of a bill, and generally they can not be contradicted if they are harmonious." This case very singularly cites, as an authority for the above position, the case of *State v. Swift*,²⁹ which was decided in 1875, and is a most thorough and learned investigation of this subject. That court holds that neither the journals kept by the legislature, nor the bill as originally introduced, nor the amendments attached to it, nor parol evidence, can be received to show that the statute roll is not a law. In short, it stops all investigation with the certified statute roll in the secretary of State's office, and reasserts the original English doctrine as reported by Lord Hobart.

The Supreme Court of the United States has also passed on the question in *Gardner v. Collector*,³⁰ where Judge Miller says: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when it took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question;" and in the later case of *Town of Ottawa v. Perkins*,³¹ a majority of the Supreme Court hold that the existence of a law is a judicial question to be decided by the court, though framed in form as an issue of fact; and they cite *Gardner v. Collector*, with approval. The question is one for the court to try by an inspection of the statute rolls and journals, and not to be tried by a jury.³²

From the foregoing review, the different conclusions arrived at may be condensed as follows: 1. Those where the statute roll is

held to be conclusive both as to the contents of the statute and the regularity of its passage. 2. Those where the statute roll is conclusive as to the contents of the law, but not as to whether all the constitutional requirements have been observed in its passage. 3. Those where the courts may go behind the statute rolls, but make the journal conclusive evidence of its contents. 4. Those where the courts may go behind the statute rolls, and allow any evidence, in addition to the journals, which may convince the judicial mind that the Constitution has not been complied with in the enactment of the law.

It is undoubtedly true that the rule of *Rex v. Arundel*³³ is safest and most certain. If it be true that courts are not bound by the statute roll, but may look beyond that record, how far may this investigation be extended? And here is where the other rule becomes inconveniently uncertain. When we reflect on the manner in which the journals are kept; that their being read each morning is usually dispensed with; that the clerks having the duty of compiling them are generally appointed more on account of their capacity to manage a political ward meeting than to do efficient clerical work; when we consider the probability of mistakes in these journals, and the uncertainty of verbal testimony affecting legislation, it seems a startling proposition that all our statute laws depend for their validity upon the journals or other memoranda and documents used in the process of law-making. In the nature of things, these journals must be constructed out of loose and hasty memoranda made in the pressure of business and amid the distractions of a numerous assembly. There is required not a single guarantee of their accuracy or their truth, which in practice is not generally dispensed with. No one need vouch for them, and upon the final passage of a bill, they are not searched to know whether they contain sufficient to insure the law's validity. This uncertainty is further demonstrated by the fact that the engrossed bills are also customarily filed with the secretary of State along with the statute rolls, and they contain the original entries by endorsement from which the journals are made up—showing the number of the bill, the days on which it was read, the date of its passage, and the

²⁹ 10 Nevada, 176.

³⁰ 6 Wall. 499.

³¹ 94 U. S. 280.

³² *Supervisors v. Heenan*, 2 Minn. 330.

³³ *Supra*.

vote on the same. Should these entries on the engrossed bill differ from the journal entries, which are to control? Or shall oral testimony be resorted to, to give either side the preponderance? As a matter of fact, the original entries on the engrossed bill are more likely to be correct than the journal entries; they are the memoranda made at the time, and the journal entries are taken from them.

There may be fraudulent entries in the journal. A lobbyist may, with a view to save his master the expense of buying a whole legislature, bribe the journal clerk and, under the new rule, defeat legislation. This is by no means the cry of an alarmist; such an event is not improbable.

But, notwithstanding these objections to the new rule, it must remain the established doctrine in those States having a Constitution such as Missouri or Illinois has. Otherwise, all those constitutional regulations of legislative proceedings may as well be erased. When the fundamental law requires that certain formalities shall be observed before a bill becomes a law, and that these different formalities shall be entered in a journal, the inference is clear that this journal has assumed a high character as evidence, and that unless it should show a full compliance with the Constitution the statute roll must fall. The mistake of our Constitution-makers is in giving such mighty potency to a journal clerk, when they have thrown no guarantees or safeguards around his botched and clumsy record. The Missouri Constitution provides that no bill shall become a law until signed by the presiding officer of each house, after being read in open session, and then signed by the Governor, etc.; and that every such bill shall become a law, thereupon, "unless it be in violation of some provision of the Constitution." Whether this exact language means the same as "unless it shall have been passed in violation of some provision of the Constitution," remains yet to be decided. That instrument requires greater formality and certainty in regard to the statute roll than it does concerning the journals; and its authors seem to have overlooked the fact that the journal may carry on its face the death-wound of the statute roll, "so that neither the parchment nor the great seal itself can save it."

C. M. NAPTON.

WHAT CONSTITUTES A CONVERSION?

The history of the law with regard to actions for tortious interference with the right of property in goods affords a very good illustration of the rigidity of our common law in former days, and also of the difficulty there is in thoroughly eradicating the influence of ancient forms even under a more enlightened and flexible system. The ancient action of trover was based originally upon a fiction, a fictitious finding or a fictitious bailment being supposed antecedent to the conversion complained of: and though these fictions have long been dropped, difficulty has still arisen, because the conversion may be fictitious also in one sense—that is to say, the wrong actually complained of may not be a conversion to the use of the defendant at all in the natural sense of the words. The result is that, as must necessarily happen when words are diverted from their natural meanings, it becomes difficult to say at last what is included in the term "conversion." In consequence of this uncertainty there have been several cases in which the judges have differed in opinion as to what constitutes a conversion.

The recent case of *Glyn & Co. v. East and West India Dock Company*,¹ a case in which Bramwell and Baggallay, L.JJ., dissentiente Brett, L. J., overruled Field, J., is an instance of the difficulty that we refer to, though the leading case on this question is *Hollins v. Fowler*,² a case in which the opinions delivered by the judges in the House of Lords almost exhaust the subject. We do not propose to go into the details of these cases or the other more or less conflicting authorities on the question, what constitutes a conversion? We are rather disposed to suggest that the whole controversy is obsolete, and that the substantial questions that were involved in the old discussion ought now to be fought out on other lines.

It is common knowledge, acquired by every student of law in reference to the origin of the action on the case, that the old common law provided certain definite forms of action. The actions provided with regard to tortious interference with the right of property in

¹ 29 W. R. 316.

² L. R. 7 H. L. 757.

chattels were trespass, trover and detinue. The idea of the action of trover was of goods not actually seized while in the owner's possession, but found or bailed, and afterwards tortiously converted by the finder or bailee to his own use; and by the very hypothesis on which the action was based, the measure of damages was the value of the goods. This being the form of action, the next question is, what are the facts that can be fitted into it—in other words, what facts are evidence of a conversion? With regard to that question the course of things is, as might be expected, this. Legal experience constantly shows that the mould or form of action is by no means suited to all the requirements of real life, and to meet all the cases of injuries to the right of property in chattels. It is consequently every now and then more or less stretched by judges desirous of doing justice. The result is that attempts are made to stretch it still further, but then the divergence from the natural meaning of words becomes too glaring, and other judges resist the tendency towards expansion. A struggle is apparent in the course of the decisions, and the meaning of the word "conversion," fluctuates and becomes uncertain, the opinions of the judges tending sometimes one way, sometimes the other. The opinions of Blackburn, J., and Brett, J., in *Hollins v. Fowler*, in the House of Lords, and the judgment of Bramwell, B., in that case in the court below, and his judgment in *Glyn & Co. v. East and West India Dock Company*, are most instructive reading, as showing the nature and scope of this controversy. It is difficult to summarize the views therein expressed with regard to the points at issue, but it seems to us that there are involved two questions, one of which is a question of form, the other one of substance, and the two became mixed up together in the discussions about what constituted a conversion in such wise, that the formal and technical question much obscured and confused the substantial one.

We will endeavor to state what, in our opinion, the two questions are. To begin with the question of form. The action of trover was an action in which the alleged grievance was that the defendant had converted the plaintiff's goods to his own use. The question thereupon arises, what acts amount to a conversion of goods to a per-

son's use? The answer made by the text-books is too vague to be of much use. Some such expression is generally used as, that any exercise of dominion inconsistent with the plaintiff's right of property in the goods is a conversion. That is very much like answering a question by stating it again in more elaborate terms, because the question immediately arises, what exercise of dominion is inconsistent with the plaintiff's right of property? Some acts obviously do not amount to an exercise of dominion, as if I pat a man's horse as it stands in the street; while some obviously do, as if I drink a man's wine. Some acts, again, are on the line. A man may do acts which may fairly be described as the exercise of dominion over property without the authority of the owner, but it may be doubtful how far they can be said to be inconsistent with his rights of property. For instance, a man without negligence, in ignorance of the true owner's title, may become bailee of goods from a person who has no title to them, and proceed to do acts of dominion to the goods which may, more or less, prejudice the true owner. Take the cases put by Bramwell, L. J., in *Glyn & Co. v. East and West India Dock Company*, of goods of one person stolen or taken by mistake by another person, and by him delivered to a carrier to be carried to a distance, and then delivered to a third person, and so carried and delivered accordingly. The learned lord justice says that the carrier clearly would not be guilty of a conversion; but we do not think the case of a carrier is a good one to select, because the carrier may be entitled to a special protection, being obliged to carry goods offered to him for carriage.

We would rather take the case of an innocent bailee, not entitled to any special protection, who does some act to goods of a nature, such as their carriage to a distant place, but not meaning to assert any title or right of dominion antagonistic to the true owner's title. The question arises, has there been a "conversion to his own use?" It will at once be apparent what the second or substantial question is from the instance we have given—viz., how far a dealing with a person's chattel in ignorance of his title by the direction of another, and in the *bona fide* belief of such other's title is, in the absence of neg-

ligence, tortious as against the true owner if damage thereby accrues to him. *

The two questions are dreadfully confused together *ex necessitate rei* under the old law, but they really do not seem to have any necessary connection with one another. The decisions with regard to conversions have heretofore exhibited two points of view. One is that, as a general rule, every exercise of dominion over a chattel without the authority of the true owner, whereby the true owner's enjoyment of the chattel is lost or substantially derogated from, is a conversion, although, in one sense, there may be no conversion to the use of the defendant, and no intention on his part in derogation of the plaintiff's title, of which he may be necessarily ignorant. Every act done to a chattel, except some trifling acts which do not substantially alter the condition of the thing, is *pro tanto* an exercise of dominion over it, and if it causes or conduces to the loss of the chattel by the plaintiff, or deprives the plaintiff of the full enjoyment of it, may be said to be a conversion. This is one point of view. The other seeks rather to narrow the meaning of the terms "conversion to the defendant's use" in the interests of the innocent bailee. Its holders seem to say, if we rightly understand it, that conversion implies some act in derogation of the plaintiff's title in assertion of a title inconsistent therewith; that a bailee who, without any knowledge whatever of the true owner's title, merely fulfills the mandate of the party who has bailed the chattel to him, can not be supposed to assert any title inconsistent with the plaintiff's, or to convert the goods to his own use.

Let us illustrate the extreme difficulty that arises between these conflicting views by instances. A person who has stolen goods bails them to another (we will not say a common carrier), to be carried to a distant place, and then delivered to a third person. The bailee performs the mandate in ignorance of the true owner's title. Again, the stealer of goods bails them to another person to be taken care of at the place of such bailment until application for their re-delivery. The bailee performs the mandate in ignorance of the true owner's title. Are both, or is either of these cases, a case of conversion by the bailee? We have selected these cases because they seem to us to be illustrations of the way in which the two questions of form and sub-

stance are confused together by the question of conversion. We do not know that they are the best illustrations that could be selected, but we think they may suffice to give an inkling of our meaning. The cases are not, to our mind, necessarily identical in point of justice; but to make the whole question one of conversion, may render it difficult to give effect to any distinction between them.

It seems to us that under the present system of law and pleading, which knows nothing of forms of action, to make the question whether there has been a conversion or not, is oftentimes to apply a wholly obsolete test. We can not say that we hold with the notion that makes the tortiousness of an act done to another in respect of his property, depend upon knowledge of the right of the true owner, or the intention to contravene that right. A man who voluntarily does an act to property not his own, must take the risk. He chooses to rely on the title of the person giving him the mandate. Unless the carrier's case put by Bramwell, L. J., is to be regarded as depending on the carrier's being compelled to carry the goods, and so his act being not voluntary, we can not think that the law ought to be as the Lord Justice says it is. There is no such very great practical hardship. If the bailment is in the course of a business carried on for profit, as is generally the case, it is an ordinary incident of the business, for which the bailee must be taken to recoup himself from his profits, if not by suing his bailor. On the other hand, it is a general incident of property, and necessary to its effectual protection, that no one should be entitled to deal with property except the true owner, or those authorized by him, without being responsible for damage thereby occasioned. Assume that an act would be tortious if done by some one other than the true owner, without a mandate at all; how can it make any difference that some one gives a mandate who has no title to do so?

The law at present seems to us to be in great confusion on this subject, and very uncertain; and it seems to us that the existing decisions are vitiated by the fact that they proceed on the assumption, derived from the old system, that the tortious act must amount to a conversion. But why should this be so? The true question seems to us to be whether there has been a dealing with property unau-

thorized by the true owner, which has caused damage to the true owner. The question was further complicated under the old system by the fact that, as a necessary concomitant of the nature of conversion, the damages were the whole value of the goods. Some modern cases, such as *Johnson v. Steer*,³ had, however, to some extent broken in on that doctrine. The damage caused by the tortious act need not necessarily be the value of the goods, but the damage actually caused, when once the absolute necessity for a conversion is gone. If by the dealing of the innocent bailee with the goods the owner is not really damnified, as may be the case when the act of the bailee is merely the performance of the mandate of a bailor, then no action ought to lie, because there is no damage. This would in most cases dispose of the case of the warehouseman merely keeping goods and restoring them to the person who had deposited them, and other such cases.⁴ On the other hand, we can not see why, if the act of the bailee has occasioned the damage to the true owner, he should not bear the loss. For instance, if the bailee removes the goods to a distant place, and the plaintiff's title is then discovered by him, and he does not deliver them there to the bailor or his order, but refuses to bring them back, then the measure of damage would be the damage sustained by the true owner, by reason of his goods being at the distant place instead of where they were taken from. Under the old system, it apparently would be conversion or nothing in such a case.

We think if the matter is really analyzed to the bottom, the case of the innocent bailee is analogous to that of a person who has innocently bought chattels to which the vendor had no title. Unless possession of personal property is to be held, as against the true owner, to be conclusive evidence of title in favor of innocent parties dealing with it on the strength of such possession, we can not understand on what principle the innocent bailee is to be protected.

Whatever the true rule may be, it is much to be wished that, forms of action being abolished, the law on the subject could be put on a more certain footing without regard to antiquated nomenclature, and the former decisions

of judges hampered by the then existing forms of action.

MANSLAUGHTER—INTENT—PERSON ACTING AS PHYSICIAN.

STATE V. SCHULZ.

Supreme Court of Iowa, April, 1881.

If one assuming the character of a physician through ignorance, administer to his patient, with an honest intention and expectation of a cure, a remedy which causes the death of the patient, he is not guilty of felonious homicide.

The defendant was indicted for murder in the second degree, committed, as is alleged, upon one Mary Rayer, whilst pretending to cure her of some disease. The defendant was convicted of manslaughter, fined \$100, and sentenced to the penitentiary for one year. He appeals.

DAY, J., delivered the opinion of the court:

The only testimony which bears directly upon the circumstances of the death of Mary Rayer, and the defendant's connection with it, is that of the deceased's husband, and is as follows: "Mary died on the twenty-sixth of May last; was taken sick two weeks before she died. Called in Dr. Kinthan. Went to get Dr. Schulz on twenty-third of May. Schulz said she was pretty badly off; used his instrument all over her body. At about 12 o'clock on Tuesday he gave her something to loosen her bowels from the same vial he was using on her body; gave her eight drops; called it some kind of croton oil. She got worse. Went for Dr. Schulz to tell him. He gave me some drops, and told me to give her 14 drops. I did not give her 14 drops; I thought it was too much. Schulz came out that night and stayed until nearly two o'clock. On Wednesday morning I told him not to call again. He answered that it would be better for him to go and see her. Mary died on Wednesday night." A *post mortem* examination was made. The examining physicians testify that they found no traces of poison. The defendant on his own behalf, testified as follows: Am a Baunscheidlitz, and practice medicine according to the books of Baunscheidlitz. Use an instrument and *oleum Baunscheidlitzii* in my practice. Was called on to treat Mrs. Mary Rayer. I treated Mrs. Rayer according to my system, with instrument and *oleum Baunscheidlitzii*. On Tuesday I gave her four drops of the *oleum* internally. She was getting better under my treatment. On Wednesday morning Mr. Rayer came to my house, and told me I need not call that morning. I told him she must have assistance, because her symptoms were very dangerous. He said that he had no other physician, and that he would come back to me. Do not know what the *oleum Baunscheidlitzii* is made of. It is a secret of the inventor. I could have

³ 15 C. B. N. S. 320.

⁴ See judgment of Blackburn, J., in *Hollins v. Fowler*, at page 767.

helped her I think, if my instructions had been followed, and if I had been allowed to go on with my treatment."

The defendant introduced 23 witnesses, who testified that they employed defendant as a physician; that he treated them with his instrument and his *oleum. Baunscheidtii*, and administered the oil internally, and that they got better. The abstract contains no evidence of any former bad results. The court instructed the jury as follows: "(12) An express intent to take life is necessary to constitute the crime of murder under the statute law of this State; and if one holds himself out as practicing physician, or a specialist in the treatment of diseases, and, through gross ignorance of the medicine he uses, and its composition, and its reasonable effects upon the human system, administers an irritant or corrosive poison in such quantities as would ordinarily and reasonably produce death, and death ensues therefrom, he would be guilty of the crime of murder. In such case the law presumes malice, and ignorance would be no excuse; nor would the fact, if such existed, that the intention was to cure. The gross ignorance in such cases creates the criminal intention. (13.) A party, whether he be a physician or a specialist, has no right to hold himself out to the public as competent to treat diseases, unless he knows what the medicine is he uses, and its reasonable effect upon the human system; and to do so, and administer internally poisonous medicines, in sufficient quantities to ordinarily produce death, and death is produced thereby, he would be guilty of murder; and if the defendant in this case, through gross ignorance of the medicine used, or its reasonable effect upon the deceased, as she was at the time, caused her death by an overdose of poisonous medicine, he would be guilty as charged; but if he was not grossly ignorant of the medicine he used, if any, and its reasonable effect upon the system, and administered it for an honest purpose, but made a mistake, he would not be guilty of the crime charged against him, and should be acquitted."

The defendant asked the court to instruct as follows: "To constitute manslaughter, the killing must have been the consequence of some unlawful act, and if the prisoner acted with an honest intention and expectation of curing the deceased by his treatment, although death, unexpected by him, was the consequence, he was not guilty of manslaughter, and you must acquit him."

In our opinion the court erred in the instructions given, and in refusing to give the one asked. In 2 Bishop's Criminal Law (4th ed.), sec. 695, the law upon this subject is declared as follows: "From the relationship of physician and patient the death of the latter not unfrequently arises. On this subject the doctrine seems to have been held that whenever one undertakes to cure another of disease, or to perform on him a surgical operation, he renders himself thereby liable to the criminal law if he does not carry to his duty some degree of skill, though what degree

may not be clear; consequently, if the patient dies through his ill-treatment, he is indictable for manslaughter. On the other hand, a more humane doctrine is laid down, that since it is lawful and commendable for one to cure another, if he undertakes this office in good faith, and adopts the treatment he deems best, he is not liable to be adjudged a felon, though the treatment should be erroneous, and in the eyes of those who assume to know all about this subject, which, in truth, is understood by no mortal, grossly wrong; and though he is a person called, by those who deem themselves wise, grossly ignorant of medicine and surgery. The former doctrine seems to be the English one, and so in England a person, whether a licensed medical practitioner or not, who undertakes to deal with the life or health of people, is bound to have competent skill, or suffer criminally for the defect. Now, if a man thinks he has competent skill, and makes no misrepresentation to his patients concerning the amount or kind of medical education actually received by himself, he seems in reason to stand on exactly the foundation occupied by every person who honestly undertakes medical practice after full advantages, so far as concerns his state of mind, and it is the mind to which we look in questions of legal guilt. Any person undertaking a cure, but being grossly careless and thus producing death, is, for a different reason, liable to a charge of manslaughter, whether he is a licensed practitioner or not."

The case of *Commonwealth v. Thompson*, 6 Mass. 134, is a very interesting and instructive one upon this question. From the testimony in that case it appears that the defendant was a grossly ignorant quack. He had three remedies which he called coffee, well-my-gristle and ram-cats. He persisted in administering emetics to his patient until he died, to all appearances, from the effects of his treatment. In this case it was held that "if one assuming the character of a physician, through ignorance, administer to his patient, with an honest intention and expectation of a cure, but which causes the death of the patient, he is not guilty of felonious homicide."

The case of *Rice v. State*, 8 Mo. 361, is much like the preceding. The defendant in that case was a botanical physician, and administered lobelia, from the effects of which the patient died. It was held that "if a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicines prescribed, or the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have no such knowledge of the fatal tendency of the prescription, that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he

is guilty of manslaughter, at least, though he might not have intended any bodily harm."

These cases seem to us to announce a correct rule. The interests of society will be subserved by holding a physician civilly liable in damages for the consequences of his ignorance, without imposing upon him the criminal liability when he acts with good motives and honest intentions. Reversed.

LAWYER AND CLIENT—LIEN FOR FEES— MONEY RECOVERED OTHERWISE THAN BY ACTION.

IN RE KNAPP.

New York Court of Appeals.

1. The lawyer's lien for compensation upon moneys received by him in the course of his employment, which comes to us *super antiquas vias*, stands upon no questionable ground, and is the same in its origin as that which exists in favor of those who have bestowed labor and service upon property in its repair, improvement or preservation.

2. It makes no difference in the application of this principle, that funds, upon which it is sought to establish a lien for compensation and disbursements, came into the lawyer's hands in consequence of other efforts than the prosecution of an action.

3. A lawyer, charged with misconduct and sought to be subjected to the summary jurisdiction of the court, is entitled to have a clear case made against him.

4. The quantum of compensation to which a lawyer is entitled, in the absence of any specific agreement between the parties, is not to be fixed by either, but subject to the discretionary action of the court.

Samuel Hand, for appellant; *John McCrone*, for respondent.

DANFORTH, J., delivered the opinion of the court:

The petitioner applied to a judge of the Supreme Court for an order requiring Ambrose Monell, an attorney and counsellor of that court, to show cause why he should not pay to her the sum of \$4,411.50, with interest from July, 1878, or why, in default thereof, an attachment should not issue against him. Her petition stated that she was the widow of Stephen H. Knapp, and his executrix; that at the time of his death there were pending certain proceedings to recover money due him from the City of New York for the erection of an armory; that in these proceedings Ambrose Monell was his attorney and counsel, and she, having been substituted in her husband's place, continued his employment in the same capacity. The estate was insolvent, and the claim in question its only asset. These facts were known to the petitioner and to Ambrose Monell. She avers the litigation was practically at end, but that there existed some objection to the payment of the money, to obviate which legislation by the State became necessary. This was ob-

tained, and, under a power given by her, Ambrose Monell, on the 19th of July, 1878, received from the comptroller \$6,781.85, part of the money in controversy; that Ambrose Monell, from time to time, paid the petitioner small sums of money; and on the 29th of October, 1878, sent her \$1,000, saying it was the balance due to her from him. In January or February, 1879, proceedings were instituted against her in the Surrogate's Court, by certain creditors of her deceased husband, and concerning which she employed counsel, and caused demand to be made on Ambrose Monell for the money received by him. In answer, he furnished an account—a copy of which is annexed to the petition. It credits her with the full amount of the money awarded in her favor, \$9,281.85, and charges her with various sums of money paid to her between July 3, 1877, and December 21, 1878, amounting to \$2,983.03; with amount reserved to indemnify comptroller for claim of David Jones, \$411.50; with amount collected by Dewhurst, by judgment, \$1,888.32; with professional services and disbursements, \$4,000—in all, \$9,281.85. Reference is also made by her to a statement furnished by Ambrose Monell, which, she says, "exhibits items of charges for pretended services and disbursements by him," adding the payment to Dewhurst was unauthorized, \$1,888.31; not paid, a bill to stenographer, \$111; unlawfully reserved to pay Jones, \$411.50; and charge for attendance and expenses at Albany, as not authorized by her, \$3,001.18.

In answer to the application, Ambrose Monell presented his affidavit, with a statement of his charges and disbursements, in detail, and which seems to be a duplicate of the one last referred to by the petitioner. It foots up \$6,000.43. Upon these papers, the judge, at special term, made an order, whereby, after reciting the papers aforesaid, and declaring that from the affidavit of Ambrose Monell it appears that he retains the said sum of \$4,411.50, as compensation to him for professional services rendered Stephen H. Knapp, in his lifetime, and Jane Knapp as such executrix, after his decease, in and about the collection of \$9,281.85, he appointed a referee "to take testimony as to the value of the services of said Ambrose Monell in the premises, and to report to the court what, in his opinion, is a just and reasonable compensation to the said Ambrose Monell for the services rendered by him;" and directed that the motion upon the petition stand over until after the coming in of that report. From this order the petitioner appealed to the general term, where it was affirmed. A hearing before the referee was had upon the petition to which I have referred, the answer of Ambrose Monell and his account. Ambrose Monell was also examined orally, and cross-examined, by counsel for the petitioner, and other witnesses were produced and examined, and cross-examined, in detail. It appeared from the affidavit of Ambrose Monell, made in answer to the petition, that his employment by the petitioner's husband commenced in

February, 1874; that the first proceeding was by *mandamus* which, "after a difficult and protracted litigation, was rendered unavailing by reason of an act of the legislature, passed after the argument in the *mandamus* case. Then followed an action at law. While this was pending, Knapp died, leaving a will drawn by Ambrose Monell. Its probate was contested, and in those proceedings he acted as proctor and counsel for the executrix; and after, he says, "a long contest" the will was sustained and letters testamentary issued to her. The pending actions were then renewed in the name of the executrix and continued. They were referred for trial and failed, upon the ground that the supervisors of New York had no authority to contract for the work in question. He thereupon endeavored to procure legislation at Albany, legalizing the proceedings of the supervisors in regard thereto. In the years 1875, 1876 and 1877 he gave to the matter his personal and continued attention at Albany; and on the last day of the session of 1877 the desired act was passed. Then came questions before the governor, growing out of some informality in the certificate of the speaker of the assembly; correspondence with that officer followed, and with his co-operation the difficulty was removed. The bill was signed by the governor. By it a new tribunal or commission was created, and before that body Ambrose Monell again prosecuted the claim, with such effect as to obtain an award for the full amount. He asserts that in all his labor with reference to the passage of the bill he was unaided, and it is apparent, except for the persistent effort and watchfulness on his part, this measure of relief would have failed. The difficulties before the commission were aggravated by a claim to a part of the same money, interposed in behalf of one John Dewhurst, who alleged an assignment therefor, executed by the testator. This, also, was litigated and disallowed. But soon after the award in favor of petitioner, and before its payment, Dewhurst commenced an action against the executrix and the comptroller of the city, to have paid out of said award the share claimed by him, and the comptroller was enjoined by the court from paying over any of the award until the determination of the action. Ambrose Monell procured a modification of the order; but, in the meantime, another claimant—one Jones—appeared, demanding an interest to the extent of \$400. Other creditors of the testator also intervened, and the comptroller refused to pay, unless advised to do so by the corporation counsel. This made necessary conferences, by Ambrose Monell, with that official; his opinion, when at last given, was in aid of the claim, and \$6,781.85 was paid over, the balance being retained by the comptroller to meet claims arising upon assignments executed by the testator. This included the amount of the Dewhurst claim. A motion to dissolve the injunction order was denied, the special term sustaining the demand; and thereafter, as the result of efforts made by Ambrose Monell for its adjustment,

a meeting of the attorneys on both sides was held, at which Dewhurst and Jane Knapp were also present, and the claim, with her approbation, settled. Judgment was allowed to be entered by him for the amount agreed upon, and it was paid. The comptroller required Ambrose Monell's bond of indemnity for the amount of Jones' claim, and, it being given, the sum was paid over to him. He also states that during the entire time that he was working for Mr. Knapp and the petitioner, he never received a single dollar, either as compensation for his services as attorney and counsel or to reimburse him for money expended; that he has paid out in their business over \$1,000, besides advancing to the petitioner from time to time moneys out of his own pocket, with which she might pay the rent of the premises occupied by her, she stating to him that "she had no one else to whom she could look to save herself from being turned into the street." He also states that the petitioner was kept fully informed of every step taken in these matters, the adverse result of the earlier proceedings, and that it was necessary to go to the legislature for relief, "and he would endeavor to secure the passage of the requisite act;" she was familiar with all his efforts in her behalf, knew of his progress and offered "to render any assistance she might be able to facilitate the passage of the bill." The account shows that for all his services and disbursements, he retains the sum of \$4,000, and the further sum of \$411.50 to indemnify him upon his bond to the comptroller. The insolvency of the petitioner is apparent. Upon the hearing before the referee, it further appeared that Mr. Knapp employed Ambrose Monell, after failing through other attorneys to secure his claim. His services and proceedings are stated with much minuteness as to time and circumstances. In regard to the services at Albany, he prepared the proposed statute, and appeared before various committees, and sought by personal interviews with members of the legislature, to obtain a favorable consideration for his measure. The cross-examination by the petitioner's counsel was at least fearlessly conducted, and no sentiment of professional courtesy was permitted to stand in the way of the rigid performance of the duty which he owed to her. The examination in no respect diminished the weight of the narrative contained in Ambrose Monell's affidavit, or disclosed any omission on his part of scrupulous fidelity to his client, or failure to perform to the utmost the service he had undertaken. He also called as witnesses two "able and honorable lawyers," as they are characterized in the opinion of the learned judge at General Term, one of whom was for six years a judge of the Superior Court of the City of New York, and both of whom were practitioners of at least twenty-five years' experience. The first testified that the services rendered by Ambrose Monell, as detailed in evidence, were reasonably worth \$5,900, and that this conclusion was reached by taking each item of service, and affixing to it such value as

the witness considered it worth. The other named \$3,500, in addition to disbursements, as a reasonable and proper charge. No witnesses were called by the petitioner. The referee returned to the court the testimony taken by him, and reported that, after carefully considering the same, he was of the opinion that "the sum of \$4000 is a just and reasonable compensation to the said Ambrose Monell for the services rendered by him in the premises." Upon due notice the application for the order first referred to was again brought to the attention of the court, and an order made by which, after reciting the proceedings above stated, the petition and affidavit of the respective parties, and the report of the referee, the application was denied. Upon appeal to the General Term, this order was reversed, and the application "granted to the extent that the said Ambrose Monell be directed to pay to said Jane Knapp, or to her attorney, within ten days, the sum of \$1,500 out of the moneys collected by him as her attorney; and in default of such payment," she had leave to apply on one day's notice for an attachment against the said Ambrose Monell. It is this order which is now before us. The application of the petitioner to the court must have been upon the theory that the attorney was its officer, bound to do no wrong, but to act "with all good fidelity, as well to the court as to his client," and in these respects, subject to its jurisdiction. So far, the power of the court over the conduct of its officers is absolute and exclusive, "necessary," as is said by Marshall, C. J., "for the preservation of decorum, and the respectability of the profession (*In re Burr*, 9 Wheat. 531), and to those ends to be exercised in a summary manner, according to its discretion and judgment. It may, therefore, regulate the manner in which the attorney shall exercise his calling, but can lawfully go no further. That it has done so in this case is the first contention on the part of the appellant. His counsel argues that the order of the general term was without any foundation in the evidence, and beyond the authority of the Supreme Court. On the other hand, it is claimed that the petitioner was entitled to have paid to her the entire sum received by her attorney; that it all belonged to her; and that she was at once entitled to its possession. Her demand was upon that theory. It excluded the possibility that under any circumstances the attorney had a right to retain or charge the fund, either by application or upon his account, or by way of lien; and this was her position, although the employment of the attorney and the performance of service by him was admitted. The judge, whose interference to enforce her demand was first invoked, appears to have assumed the contrary; for he directed an inquiry as to "what is a just and reasonable compensation," to the attorney, "for the services rendered by him"—a fact quite unimportant if he had no right or interest in the money. The same inference is permitted from the order of the general term affirming the order for this inquiry. The

subsequent order of the judge, denying the application when it was shown that the value of the attorney's services exceeded the sum of money held by him, and even the general term in making the order appealed from, go upon the ground that the attorney was not destitute of some justification in refusing to comply with the petitioner's demand; for otherwise, its order would have required the payment over of all money he would have received. But even now, the contention of the respondent is that such order should have been made; that the order of the special term unduly protects the attorney and invests his office "with an extraordinary prerogative, at which the alarm of suitors may well be awakened," and her learned counsel pointed out the injurious effect upon the profession, and the injustice to the client, of an adjudication which upholds the attorney's right to retain his compensation from moneys collected by him. The doctrine was criticised as if it was new and depended for its support upon recent decisions. On the contrary, the general proposition that an attorney has a lien for his costs and charges upon deeds or papers, or upon moneys received by him on his client's behalf in the course of his employment, is not doubted; nor does it stand upon any questionable foundations. It comes to us *super antiquas vias*. As early as the year 1734, it was held by Lord Chancellor Talbot to arise upon a contract implied by law, and as effectual as if it resulted from an express agreement. *Ex parte, Bush*, 7 Viner's Abs. 74. And in 1779, in *Wilkins v. Carmichael*, (1 Doug. 101), Lord Mansfield declared that the practice which protected it "was established on general principles of justice, and that courts of both law and equity had carried it so far, that an attorney or solicitor may obtain an order to stop his client from receiving money in a suit in which he has been employed for him till 'his bill is paid;'" and in *Welsh v. Hale* (1 Doug. 238), the same judge held that an attorney has a lien on the money recovered by his client for his bill of costs. "If the money come to his hands, he may retain the amount of his bill. He may stop it *in transitu*, if he can lay hold of it. If he applies to the court, they will prevent its being paid over till his demand is satisfied." Indeed, he was inclined to go still further and to hold that, if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by defendant, after such notice, would be in his own wrong, and like paying a debt which had been assigned after notice. And *Parke, B.*, in *Barker v. St. Quentin* (12 M. & W. 451), refers to this decision as establishing an attorney's claim to the equitable interference of the court to have the judgment held as security for the debt due to the attorney, or after notice to compel the defendant to pay its proceeds over again. In our own State this was so well settled that Kent, in his Commentaries (vol. 2, p. 641), puts it down as an established principle that the attorney has two liens for his costs—one on the papers in his hands,

and the other on the funds recovered. No new rule, therefore, was enunciated in *Bowling Green Savings Bank v. Todd* (52 N. Y. 489), where it was said that the "lien of the attorney * * * attaches to the money recovered or collected upon the judgment." It is plain, then, that the right of lien exists. Its origin should not be lost sight of. The declaration in *Ex parte Bush* was restated by Chancellor Eldon in *Corvell v. Simpson* (16 Ves. 279), where he describes it as *prima facie* "a right accruing through an implied contract;" and as it exists in favor of those who have bestowed labor and service upon property in its repair, improvement or preservation, the agreement implied must be that the person rendering it shall retain the property until compensation is made. The lien of an attorney stands on no higher ground. In *Ex parte Yaldon* (4 Ch. Div. L. R. 129), James, L. J., says: "The things upon which they claim a lien are things upon which they have expended their own labor or their own money," and asks, "Why are they not to have that lien in the same way as any other workman, who is entitled to retain the things upon which he has worked, until he is paid for it?" And in like manner, in a recent case of *Coughlin v. N. Y., etc. R. Co.* (71 N. Y. 443), the lien of the attorney upon a judgment recovered by him is upheld upon the theory that his services and skill procured it. Whenever it exists, it is supported by the courts. In the case of a horse trainer, *Best, C. J.*, says: "As between debtor and creditor, the doctrine of lien is so equitable, it can not be favored too much" (*Jacobs v. Latour*, 5 Bing. 130); and this remark is quoted by Sugden, L. Ch., and applied to the case of a solicitor claiming a lien in *Blunden v. Desart*, 2 Dr. & W. 427. It, however, does not stand alone upon the equity or justice of the common law as interpreted by the courts. It was secured to the English attorney and solicitor by statute (18 Vic.), and the profession in this State, by sec. 66 of the new Code (Laws of 1879), declaring that "the compensation of an attorney or counselor is governed by agreement, express or implied," * * * and that "from the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosoever hands they may come." It may be said that the case of *Ambrose Monell* is not within the letter of this provision, for although an action was commenced, the termination was not in favor of his client, and the money in his hands is not the proceeds of any judgment in an action. But it is within its purpose, and is within the principle of the common law doctrine to which I have referred. *Armerod v. Tate*, 1 East, 464, brought up the question upon an arbitration, and it was contended that the attorney's lien was confined to the case of money recovered by judgment of the court, and did not extend to money

awarded. But *Kenyon, C. J.*, ruled otherwise, and put his decision upon the "convenience, good sense and justice of the thing." Now, in the case before us, there was but one claim placed in the hands of the attorney. He received it in his professional character, and each item of service was directed to its enforcement. At the beginning he brought an action, and failing in that, without fault on his part, sought to have removed by legislation the impediment which stood in the way of a recovery. In this he was successful. The act of 1877, ch. 473, was enacted; the liability of the City of New York to pay for labor and materials expended in the erection of its armories was declared, and a commission created to determine upon the validity and amount of claims relating thereto. It had judicial functions to perform, and was to be governed in its procedure "by the rules and practice applicable to suits at law." Its determination was to be certified in writing, and was made final and binding upon all parties concerned (Laws of 1877, ch. 473, secs. 2, 3). The claim in question was prosecuted before this body, and was enforced by its determination. The rights of the attorney are not other than they would have been, if the same result had followed the judgment of a court of law. It is evident that in all he did from the moment of his retainer until the receipt of the money, he was acting in a professional character, and that the petitioner, as well as himself, understood that the relation of attorney and client existed between them to the end. We have seen that his fees are regulated by no statute, and that they depend on contract. It is true, also, that there is no evidence of any express agreement between them as to the rate or measure of compensation, or as to the source from which he was to be paid; but an agreement or understanding as to the latter may be implied from the facts and circumstances of the case. His client was insolvent; the claim in his hands was the only asset of the estate. The client neither contributed to the disbursements of the proceedings, nor did she have the ability to do so. She was herself the subject of aid; she had not paid the attorney anything, nor does she now offer to pay him anything. It can not be doubted that both expected the attorney would, in case of success, look to the fund recovered for reimbursement for money out of pocket and payment for his own labor. But there is also evidence of such an understanding. The attorney, in his affidavit, made in answer to her petition, and to which, on the final hearing of her application, she had an opportunity to reply, states that "he informed her of the risk he was assuming in devoting so much of his time and labor in the attempt to collect this claim, and the expense to which he was put, and which could never be repaid unless he succeeded in securing the passage of the bill and obtaining an award from the commission." This is not denied by her. Its occurrence accords with the condition of the parties, and it is probable that the minds of both met on

that statement. But there is enough in the narrative of either party to establish on her part an obligation to pay for such services as he might render, and on the part of both an agreement that his compensation should be taken from the award. Indeed, I do not understand the respondent's counsel to assert the contrary. His contention, in terms, is, "the fund was not bound by any contract of the petitioner, she being an executor." But the cases cited in its support (*Austin v. Munn*, 47 N. Y. 360; *Ferrin v. Myrick*, 41 Id. 315; *Bowman v. Tallman*, 2 Robt. 385), do not apply. They relate to actions upon contracts for the recovery of money, and have no relation to a case where a right of lien exists upon a fund.

It must be borne in mind that the attorney was not before the court asking for its favor or protection. He was taken there and made subject to its summary jurisdiction, because charged with misconduct. He was entitled to have a clear case made out against him. Enough has been said to show that the attorney has such a right of lien—the right, therefore, to retain and possess the fund until the lien is satisfied; and the extent of that lien is, as assumed by the General Term, "compensation for his professional services rendered, and for disbursements expended by him." But he can not be permitted to determine its amount, nor can his client. In England, the question would be sent to the taxing master with the bills and the attorney, and with us, before the Code, to the clerk of the court who, in our practice, acts as taxing master. *People v. Smith*, 3 Cai. 221. But now that the compensation is undefined, depending upon a *quantum meruit*, unless limited by an express agreement (Code, sec. 66; *Rooney v. Second Ave. R. Co.*, 18 N. Y. 368; *Marshall v. Meech*, 51 N. Y. 143; *Whitehead v. Kennedy*, 69 N. Y. 462; *Wright v. Wright*, 70 N. Y. 96; *Coughlin v. New York Central etc. R. Co.*, 71 N. Y. 443; *Zoybaum v. Parker*, 55 N. Y. 120), such a tribunal would be unsatisfactory. A mere inspection of the account, and examination of fee bills, would afford to it no light. Where, upon the facts stated, the right is clear and the amount only in question, it could be well determined by a referee or by the judge himself at special term, or by a jury passing upon an issue sent to it. It seems the English courts refuse a summary interference, unless the facts are settled or conceded, not for want of jurisdiction, but because they "would have too much to do upon affidavits." *In re Phelps v. Down*, 3 Jurist, 479. *In Re Millard*, 1 Dowl. Pr. 140, an application was made that M., an attorney, deliver up certain deeds on payment of all costs that might be due on taxation. But it was objected that he had also a lien upon them for services rendered as solicitor, employed by the moving party to raise money upon them. It was contended that the other party was liable for those services; but the court says: "He says you are bound to pay him, and that he has a lien on the deeds. That can only be determined by a jury. The court can not interfere to try the question of

lien." In *Hodson v. Tewall*, 2 Dowl. Pr. 284, was a motion by a client that the attorney pay over moneys collected. The taxed costs had been paid, and the attorney claimed to retain for more. The client and two other witnesses swore the attorney agreed to conduct the proceedings for taxed costs. This was denied by the attorney. The court, Bayle, J., said: "I think we can not interfere. You must go before a jury, who will be competent to decide whether there was such an agreement." But whatever mode is resorted to, the question is ultimately for the court. It has jurisdiction over the attorney's bill when the fact appears that he retains his client's money, although the items of his account are not such as in ordinary cases would subject them to taxation. *In re Murray*, 1 Russ. 519; *In re Rice*, 2 Keene, 181; *In re Aitken*, 4 Bar. & Ald. 47; *In re Lord Cardross*, 7 Dowl. Pr. Cases, 861; *In re Ford*, 8 Id. 684. But to do justice, it is necessary that his lien should be discharged; and to ascertain that, evidence must be resorted to. The court can not act arbitrarily, and so tie the attorney's hands that the client may carry off the fruits of his labor. In *Marshall v. Meech* (51 N. Y. 140), there was no question as to the amount due, but a referee was appointed to ascertain whether the opposing party—not the client, but one to be affected—had notice of the lien. So in *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, where the question was as to the existence of the lien, and in the case before us, where the sole question related to the compensation of the attorney. It extended, however, to the whole account. Here the general term had before it the petition, the affidavit, the evidence of the witnesses, and the report of the referee. We have carefully examined them, and agree with the counsel for the appellant that they furnish no ground upon which the decision of the learned court can stand. To uphold the order the learned counsel for the respondent refers to *Whitehead v. Kennedy* (69 N. Y. 468), and *Bowling Green Savings Bank* (52 Id. 493). In the first case, power on the part of the appellate court to reject certain items or claims embraced in the recovery is upheld, "provided," among other things, "the plaintiff consents to forego his claim to recover them;" and in the second, it was held that no lien whatever existed in favor of the person who set it up. In both, the facts were undisputed, but neither of the conditions found in these cases exist here. As to the amount of compensation due to the attorney there was diversity of opinion. Neither the attorney nor the witnesses agreed. As to the rendition of services there was no dispute, and the order of reference made by the special term, and affirmed by the general term, against, it is said, opposition of the petitioner, intimate very emphatically that the only question for consideration was that of value. And this seems now the result of the general term. It is plain that the petitioner sought to deal hardly with her attorney. Her application, if successful, would have

taken from his hands the fund to which he looked for compensation, and left him with a cause of action against an insolvent estate. No doubt he was bound to content himself with a remuneration proportionate to his labor and the importance of the matter upon which it had been bestowed, but she would deny him even his expenses, require him to forego pecuniary remuneration, and remit him for satisfaction to the enjoyment of that fanciful disinterestedness which, under certain ancient professional rules of action, required the lawyer "to defend the rich from a sense of duty, and the poor from a kindly sense of interest"—codes which were unsuccessfully invoked in *Stevens v. Adams* (26 Wend. 471), and which, as practical guides, have been long since abandoned. On the other hand, the attorney appears to have acted in good faith. With no stipulation for a contingent fee, inflamed in view of exaggerated or apprehended difficulties, he fixed his claim for compensation after the business intrusted to him had been carried to a successful end, and subject, as he knew, to revision by the courts. That review has been had. His charges have been fixed by the special term, founded upon the referee's report, but the general term was "of opinion that the referee should have cut down certain charges to a more suitable figure," and directed that the attorney pay to the petitioner the sum of \$1,500. It may be that those charges are excessive. The referee and special term considered the same items, and we are not called upon to examine them; but it should be observed that, for aught that appears, the deduction now suggested by the general term was, in fact, made by the referee. The bill of the attorney, including the items to which the general term calls attention, amounts to \$6,000.43. It was the one under examination by the referee and the special term. The sum reported by the referee, and adopted by the special term as a reasonable compensation to the attorney for the services rendered by him, was \$4,000, showing a deduction of \$2,000. So that after deducting the sum of \$1,500 from the same bill of items where those objected to appear, there would still remain due \$4,500. In other words, the referee and special term allowed upon a bill, whose items came to \$6,000.43, the gross sum of \$4,000 only, with no discrimination of items, while the general term, with the same bill of items before it, objects to certain specific items, and upon those objections makes the order complained of. If that court had simply deducted those items from the bill, where alone they appeared, the balance remaining would have exceeded the sum allowed by the referee. The learned judge, at General Term, says: "The referee fixed the value of his" (the attorney's) "service at a gross sum." "We can not," he adds, "distinctly see that he allowed any particular item as charged in the account; but we think it our duty to scrutinize closely such items as seem to have no substantial basis." Now, it is quite apparent that the referee may have deducted

the very items so objected to. As we have seen, he did reduce the amount by a larger sum, and if this order stands, it is hardly possible that injustice will not be done to the attorney. The items commented on are: One of \$250 for general services, including interviews with creditors; one of \$200, under substantially the same head; and charges for expenses and attendance at Albany during sessions of the legislature, and while the act referred to was being pressed. The learned judge remarks, "that it does not appear that improper appliances were used to procure the passage of the bill. But," he says, "it seems strange that such long persistency of effort should have been required for its passage." It is to these charges the learned court refers, and in view of which the order is made. That the services were rendered is not denied. The passage of the act was indispensable to the collection of the demand. How far the attorney was stimulated to extraordinary exertions by the conviction that all his past labor in the case would be lost and his expenses incurred in vain, unless in this measure he succeeded, we need not inquire. That such conviction was entertained and was well founded, appears from the condition of the estate. But if the abatement was made which the learned court suggests, it would still leave his admitted lien equal to all moneys in his hands, and no arithmetical device can alter his equity.

The order of the General Term should be reversed, and the order of the Special Term affirmed, but without costs and without prejudice to the right of the petitioner to bring an action, if she is so advised.

CONTRACT—CONSTRUCTION—THIRD PARTIES.

MEYER v. DUPONT.

Kentucky Court of Appeals, June, 1881.

Where a municipal corporation subscribes, through the means of issuing bonds, to the capital stock of a railroad company, upon the condition that the money shall be used in the construction of a certain portion of the road, and that portion of the road was constructed, but all of the subscription in question was not used for that purpose, but a portion of it was directed to the payment of other debts, a contractor, who failed to get paid for the work he did upon that portion of the road, has no right to make complaint of the breach of the contract with the city and hold the directors personally responsible for the diversion of the funds, although he may have done the work upon the faith of the city's contract to furnish such funds.

Appeal from the Louisville Chancery Court.

D. M. Rodman, for appellants; *H. C. Pindell* and *Muir, Bijur & Davie*, for appellee.

PRYOR, J., delivered the opinion of the court: There is no question but that the president and

directors of the Elizabeth, etc. R. Co. can be made individually liable for a fraudulent, and even for a wrongful or illegal appropriation of the corporate funds of the company. The question arises in this case, are the facts alleged in the petition sufficient to create such a liability? The subscription of one million dollars, made to the capital stock of the company by the city of Louisville, was to be paid or realized by the issue of the bonds of the city, the bonds to be sold by the president and directors, and, when sold, the proceeds to be paid to the commissioners of the sinking fund of the city, and to be paid by these commissioners to the president of the company upon or for work in the construction of forty-five miles of continuous road beginning at the city of Louisville; in other words, the survey was to be paid as the work progressed; one-half to be paid when the chief engineer certified that this much is due for work completed on the first thirty miles of the road, beginning at Louisville, and the other half to be paid upon a similar statement by the engineer that the same is due for work actually done on the remainder of the road; and if the amount so dedicated to the construction of either part of the road shall be more than is necessary for that purpose, it may be applied to the construction of other parts of the road. The company was also required to execute an obligation to the effect that the proceeds of the bonds would be thus applied, and in no event, as provided by the 9th section of the ordinance constituting the contract between the parties, was the subscription of stock to be subjected to the mortgage of the Elizabethtown & Paducah road.

The object of the City of Louisville was to secure the application of funds subscribed to the construction of the road next to the city; and for this purpose the sinking fund commissioners were required to retain possession of the funds, and to pay them out to the president as the work progressed in the manner specified by the ordinance. After this contract had been made by the company and the city, in pursuance of the act of February 18, 1873, the present appellants entered into a contract with the railroad company, by which they undertook to construct two sections of the road within thirty miles of the city, for \$68,000, to be paid them as the work progressed, the company retaining fifteen per centum of the amount actually due until their entire contract was completed. It is alleged that the company had in its possession a sum sufficient out of the proceeds of the bonds to pay them in full; that they had completed their contract, and there was still due them \$13,000; that it was the duty of the directors to have paid them out of this fund, but in disregard of that duty, they had fraudulently and illegally taken the money and paid it as interest on the old mortgage of the Elizabethtown, etc. Railroad Company, not leaving enough to pay any part of the balance due the appellants. That the company had gone into bankruptcy, was insolvent, and the president and

directors, by reason of their wrongful and fraudulent acts, were personally liable, etc. The contract made between appellants and the company, is made part of the petition. This contract prescribes the manner in which the work is to be done, the mode of payment, etc., but contains no stipulation by which the proceeds of the bonds in the hands of the sinking fund commissioners is assigned to the appellants, or any lien given them on this fund to secure its payment. The City of Louisville is not complaining, or a party to the action; nor is there any allegation that the road has not been completed or the work done as agreed on by the company and the city; but, on the contrary, the legitimate inference from the facts stated is, that the road has been completed, and the proceeds of the bonds, or a part of them, applied in discharging the debts of the corporation. The contract between the City of Louisville and the appellees, or the railroad company, created no trust in favor of the contractors by reason of work done on this particular part of the road. It is true the fund belonged to the corporation, and when diverted from its legitimate purpose by the directors, that is, used for purposes other than the construction of the road, or in payment of debts due by the corporation, the directors would have been individually liable. The appropriation of this fund to the construction of a particular part of the road, was to secure the City of Louisville, and when the contract between the city and the railroad company has been complied with, the contractor has no right to complain. He may have constructed upon the faith that this fund could build the road the distance contemplated, and that the subscription would insure the solvency of the corporation; still he had no lien upon the fund, or the right to demand that the money paid him by the company should come from the proceeds of the Louisville bonds. These appellants were being paid monthly by their contract with the company, when the company was not entitled to receive any part of the proceeds of the bonds until the work of the value of one-half the proceeds had been completed on the first thirty miles, and work of the value of the remaining half on another part of the road. So the appellants were being paid monthly until the work had progressed to its completion; and now the appellants insist that \$120,000 of the proceeds of the bonds had been paid on the old mortgage executed by the company, and for that reason the president and directors are individually liable. The proceeds may have been invested in this way, and yet the company have paid out a much larger sum from its own pocket than the proceeds used in paying the mortgage debts. If the appellants have a lien, or if there is a trust created by reason of their relation to the original contracting parties, no recovery can be had in the absence of an allegation that, after expending the amount of means subscribed by the City of Louisville in the construction of the road, they still had a sum sufficient left in their hands, or that had not been appro-

priated to other purposes, to pay appellant's debt. What is the difference between paying out the actual proceeds of these bonds, and a sum equivalent to the proceeds? And if they had paid a sum equal to the Louisville subscription out of the company's pocket, why had not the company the right to pay off the mortgage if the sum realized was sufficient for that purpose? It is not a violent presumption to say that the road had been constructed by the company, or the contract complied with; and when the city had been satisfied, the appellants were no more beneficiaries of the fund than any other contractor on the road. As creditor of the company they were interested in having the funds of the corporation applied to the payment of the corporate debt, and where this fund has been misapplied, the directors are liable. In the case of the *Shakers v. Underwood*, an officer of the bank had misapplied the funds belonging to the depositor by committing them to the bank's use. So in this case, if the money of the corporation is converted by the appellees in the payment of their own debts, or in the construction of some other public improvement, a liability would exist, or, as in the case of *Gratz v. Redd*, 4 B. M., and *L. & N. R. Co. v. Bridges*, 7 B. M., where the directors and stockholders constituting the corporation, instead of paying the debts of the corporation, took the money and sunk it in their own pockets; or where the sheriff has property of the principal in his possession to pay a debt for which the surety is liable, and destroys it or surrenders it to the debtor, in all these cases the legal rights of the parties are affected by the act of the party complained of. Not so in the present case. The appellants are not liable for any debt to the appellees or the city of Louisville, nor has either of them any property pledged to secure any debt owing the appellant, but the debtor is complained of for not paying out of his own means a debt due the appellant, in preference to another creditor of the same debtor. Here the effort is to make the president and directors liable for paying debts by the company, the same company with which the appellant contracted. The city of Louisville requires the money subscribed to be applied to the building of the road within certain limits; the county of Hardin, upon condition that its subscription is applied to constructing the road within its county; and A, as an individual, on condition that the money subscribed by him is to be applied to the building of the road through his farm. It is now maintained that, for the labor performed upon those parts of the road designated for the application of the money, the laborer or contractor performing the work, although he makes an independent contract, having no reference to the fund, is the sole beneficiary of the fund, and that the directors are individually liable if they apply it in any other mode, although it is done by the consent of the parties with whom they or the company contracted. The company was under no obligation to pay the appellants out of the fund. They were

not parties to the contract, and there was no trust, express or implied, that the company should pay it to the appellants, or that they were to become the beneficiaries of the fund, or any part of it. Suppose the City of Louisville had the right to have issued and sold these bonds by changing the contract on other parts of the road, as would have been the case with an individual subscription—will it be contended that the appellants had such an interest in it as to prevent this change of contract between the city and the company? We think not; and as to all parties, but the city of Louisville, the company, when it obtained the money, had the right to use it for any purpose connected with the corporation, either in the construction of the road, or the payment of its debts. Nor was the company, by the laws of the contract with the city, prevented from applying the money to the payment of the mortgage debt. This mortgage had been made, including, doubtless, all the rights and franchises of the company, and the one million of dollars of stock about to be taken was understood not to be embraced by the terms of the mortgage. That no right to this stock or the subscription passed to the mortgagees, and if such had been the contract, if the road had been constructed with the company's own means, instead of the money from the proceeds of the bonds, the company had the right to apply it to the payment of the mortgage debt. The city, however, has its stock; at least that corporation makes no complaint of the action of the directors, and the appellant has no right to make directors personally liable because they pay one debt of the corporation in preference to the other. It is no misappropriation of the funds of a corporation by the directors, when the funds are used in good faith for the corporate purposes. To pay one debt when they could have paid another, thereby giving a preference, is not a fraudulent act on the part of the directors. It is not sufficient to allege that the directors have fraudulently misappropriated the funds of the company. It must appear in what way the fraud was perpetrated. It is said the fraud consists in paying a certain sum of money on the mortgage debt. That, as we have already seen, is not fraudulent. The company had the right to dispose of it in that way, if the city with whom it had contracted had been indemnified by the construction of the road. A third party has no right to complain when the city is silent, and besides, if a trust existed, it must be alleged that the company had, or ought to have had, a sufficient sum in its hands of this fund, after the construction of the road, to pay appellant. It had the right to apply the means to the construction of forty-five miles of the road. The road is built. Now before appellants can recover upon their theory, it must be averred that this much was on hand after the construction. It is an averment indispensable to the maintenance of the action, adopting appellant's theory as the law of the case. In either aspect of the case the judgment must be affirmed.

USURY — COMPENSATION OF LENDER'S AGENT—BONUS.

ACHESON v. CHASE.

Supreme Court of Minnesota, August, 1881.

Where the lender's agent is paid nothing for placing the loan, but it is understood between them that he is to be compensated in some way by the borrower, the acceptance by the agent from the borrower of \$50, partly as a reasonable compensation and partly as a bonus for making the loan, is not usury on the part of the lender, either as to that portion which is reasonable compensation, nor as to that which is bonus.

Appeal from judgment of District Court, County of Nobles.

Emory Clark and Geo. W. Wilson, for appellants; Daniel Rohrer, for respondent.

BERRY, J., delivered the opinion of the court:

The defendant, who resided in New York, authorized Alley, who resided in this State, as his agent, and at his (Alley's) discretion, to loan money at 12 per cent. interest upon land securities to be taken in defendant's name. Alley was to receive no compensation from the defendant for acting as agent, but the defendant was to receive his 12 per cent. net—no more, no less—and Alley was authorized to charge to and collect of the borrower a reasonable compensation for his services to his principal in making the loan, without any instructions or agreement as to the amount thereof. The plaintiff applied to Parsons, both residing in this State, to procure him a loan of \$500. Parsons agreed to procure it of some third person, plaintiff to execute a note for that sum drawing 12 per cent. interest, secured by mortgage of real estate; Parsons to retain \$65 as his compensation for securing the loan. Parsons applied in writing to Alley to obtain the money of some parties for whom he was agent, promising to pay him \$50 to effect the loan. Alley forwarded Parson's application to the defendant with his approval. This application was for a loan of \$500 at 12 per cent. interest, secured by mortgage upon real estate. Defendant accepted the application, forwarded the money to Alley accordingly, and Alley handed it to Parsons, who, after receiving from plaintiff a note and mortgage as agreed, paid over to him the sum of \$500, less \$68. The latter sum was made up of \$65, agreed by plaintiff and Parsons to be retained by the latter as compensation for procuring the loan, and of three dollars, charged by Parsons for going to plaintiff's residence to inform him that the money had arrived and the loan could be completed. After having the mortgage recorded, Parsons delivered it, together with the note, to Alley, who forwarded both to his principal, the defendant. Some days after the loan was completed, Parsons paid Alley \$50, as agreed.

In all the proceedings Alley acted as defendant's agent, and not as the agent of plaintiff or of Parsons. The \$50 was not paid to any extent as

compensation for any services rendered by Alley to or on behalf of plaintiff or Parsons, as he did not perform any services not due from him to his principal, the defendant. Neither was this sum merely the adequate compensation for services which Alley performed for his principal in making the loan. It was in large part a mere bonus agreed to be paid him, and paid and received to secure his action as defendant's agent and his approval of a loan, without which it would not have been effected. The defendant did not know that Alley made any charge other than such as would reasonably compensate for such services as he might actually render in the prosecution of his agency. He did not know what sum was paid to Alley by a borrower; nor in any given case, nor in this case, did he know whether any sum was charged to the borrower by Alley, nor the amount of such charge, or the grounds upon which it was made. He understood that Alley conducted the business for a compensation received in some way from the borrower, and that whatever charges he might make for his intervention, would be made, not to his principal, but to the borrower. The defendant never received any part of the sum paid to Alley, nor was there ever any understanding that he should do so. In this instance no other benefit was received by or accrued to him, except the note and mortgage.

The transactions above recited all occurred in 1877. The foregoing facts are found by the trial court, and we have recapitulated them with perhaps unnecessary detail, in our desire to present the case fully and fairly. The question is, was the taking of \$50 by Alley usury on the part of defendant? Usury is the taking of a greater rate of interest for the loan or forbearance of money, goods or things in action than is allowed by law. Chapter 23, Gen. Laws, 1878; chapter 66, Laws 1879; Abbott's Law Dict., "Usury;" Tyler on Usury, 35. Was the taking of the \$50 by Alley a taking by defendant of a rate of interest greater than 12 per cent., the rate allowed by law, when the loan in this case was made? We think not. The \$50 may be considered either as all bonus, or as in part bonus and in part compensation for Alley's services in aid about making the loan. If it was all bonus—that is to say, a gratuity without consideration,—the taking of it was wholly the act of Alley, done upon his own sole responsibility. The defendant in no way authorized it. He knew nothing of it until after the loan was consummated, and the money and papers had passed. He has never ratified or sanctioned it by receiving any part of it, or any benefit from it, either directly or indirectly, or otherwise. The fact that it was taken by his loan agent is of no significance. The taking of a bonus was not within the scope of the agency, and the defendant had done nothing to estop him from so insisting. In taking a bonus, Alley, then, was not defendant's agent, consequently the taking was not defendant's act. In other words, defendant, if the \$50 was all bonus, has taken no bonus for the loan or forbear-

ance of his money, and nothing except his lawful 12 per cent., and, therefore, has not been guilty of usury. *Condit v. Baldwin*, 21 N. Y. 219; *Esterly v. Runley*, 66 N. Y. 446; *Rogers v. Buckingham*, 33 Conn. 81; *Gokey v. Knapp*, 44 Iowa, 32; *Brigham v. Myers*, 1 N. W. R. 613; *Tyler on Usury*, ch. 13, *passim*.

If, on the other hand, the \$50 be considered as in part bonus and in part reasonable compensation for Alley's services in and about making the loan (although the trial judge finds that there was no apportionment of any part of the \$50 to one or the other), then we have to inquire whether the taking of any part of the \$50 as such reasonable compensation was usurious on the part of the defendant. We think it was not. Alley was authorized by defendant to take it for his services to him in and about the effecting of the loan, and for no other purpose, and on no other ground or consideration. As such reasonable compensation it was received, and not otherwise. The defendant, for the loan and forbearance of his money, was by the note and mortgage—and he got nothing else—to receive his lawful 12 per cent., and nothing more. So much of the \$50, if any, as was received as reasonable compensation for Alley's services, was no part of the interest secured to the defendant. None of it came to his hands, or inured to his benefit for the loan or forbearance of the sum of \$500 loaned to plaintiff. We are, of course, speaking of reasonable compensation only, and not of some unreasonable compensation which might be a mere cover for usury. The fact that Alley took the compensation for his services rendered to his principal, the defendant, for which the defendant would have been bound to pay, so that in that way the defendant received a benefit from the taking, in no way alters the result. The stubborn fact still stands that it was not taken for the loan or forbearance of the money. We are clear that it was not usurious. *Eaton v. Alger*, 2 Keyes, 41; *Thurston v. Cornell*, 38 N. Y. 281; *Beadle v. Munson*, 30 Conn. 175; *Smith v. Wolf*, 8 N. W. R. 429; *Tyler on Usury*, 132, *et seq.*

Whether, then, the \$50 was received by Alley as a bonus, or partly as a bonus and partly as a reasonable compensation for his services in and about making the loan, we are of opinion that the taking of it was not usury upon the part of the defendant. We have examined the cases cited by plaintiff in support of the opposite view, but, so far as they are in point, they do not seem to us to be sound.

The cases cited from 3, 5, and 8 Neb., appear to have gone off upon an erroneous rule as to the responsibility of a principal for unauthorized acts of an agent done without the principal's knowledge.

Judgment affirmed.

QUERIES AND ANSWERS.

. The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

QUERIES.

27. By an act of Congress, certain lands in Kansas were granted to the Santa Fe R. Co., and certain other lands which, by reason of proximity to railroad lands, were supposed to be worth more than land further away, were classed as "Double Minimum Lands," and were sold by government to settlers for \$2.50 per acre. Land outside of this "belt" was sold at \$1.25 per acre. First, A, a settler, settled on 160 acres of land outside of this belt; but by reason of a defective survey, or other error on the part of the officers at Land Office, the land occupied by A was treated as "double minimum land," and was, by A, paid for at the rate of \$2.50 per acre, and patent was duly issued to him. Second, A sold this land to B by a deed of general warranty, and put him in possession; and his title or right of possession has never been in any manner disturbed or questioned. Subsequent to A's conveyance to B, the government found out the error, and passed a law refunding this money. A made an application for his excess money, and the Secretary of Interior rejects his application and says that B is entitled to this money. The language of the act of Congress is viz: "In all cases where parties have paid double minimum price for land which afterwards has been found not to be within the limits of a railroad land grant, the excess of 1.25 per acre shall be repaid to the purchaser thereof, his heirs or assigns." It seems to me that the construction put on this law is forced and unnatural. If B's title was faulty, it would seem equitable; but, it being faultless, it looks like a transfer of A's money to B, without a foundation in reason whereon to base the judgment. KANSAS.

28. Is written contract of servant agreeing to and releasing master from all claims for damages for injuries received by servants from negligence of co-servants or master, entered into on entering master's service, a valid defense to suit by servant for such injuries?

Indianapolis.

JUNIOR.

RECENT LEGAL LITERATURE.

BISHOP ON MARRIAGE AND DIVORCE. Commentaries on the Law of Marriage and Divorce, with the Evidence, Practice, Pleading, and Forms; also of Separations without Divorce and of the Evidence of Marriage in all issues. By Joel Prentiss Bishop. In two volumes. Sixth edition, revised and enlarged. Boston, 1881; Little, Brown & Co.

In these days the life of the average law book is short, and in a very few years after a work makes its appearance, some rival is treading upon its heels, successfully bidding for public approbation. This ephemeral tendency is probably

due partly to the rapid accumulation of precedents, making a necessity for the frequent collection and arrangement of authorities in convenient and accessible form, and partly, without doubt, to an inferiority observable in the great majority of modern text-books to the time-honored treatises which have come down to us from the days of our fathers. Naturally, then, when we pick up a book which, first published in 1852, has successfully run through five editions, we expect to find very substantial merit as the cause and foundation of such success. In this instance we are not disappointed. The subject is one of absorbing interest, both intrinsically and because of the frequency with which litigation arises concerning it. And Mr. Bishop's work is in every way worthy of the importance of his theme. It is so well known to the profession generally, that an analysis of its contents or method of arrangement can hardly be desirable to our readers. Its chief excellence, like that of the author's other works, consists in its eminently practical nature. There is, perhaps, no living author who understands as distinctly and precisely as Mr. Bishop, the extent to which a law-book is a tool of a trade, and that within its limits anything in the nature of dissertation is essentially out of place. We would not, on the other hand, be understood as stating that his work is a mere convocation of citations arranged in the form of chapters and sections. He has fortunately found the happy medium between the two extremes of discursive elaboration of artificial distinction and digest-like brevity. In stating the law upon any subject, he seems to have formed a clear conception of the question to be elucidated, stripped it of all superfluous and incumbering surroundings, and applied the result of the adjudicated cases (as interpreted by a careful examination of the facts), rather than the *language* of the court. As a consequence the book is clear, compact, precise.

A personal statement concerning the method pursued in such a work can not be uninteresting. Says the author in his preface to the third edition: "Nearly four years of hard brain labor had I expended upon it. Every volume of the reports I had taken into my hands, had examined its contents to see whether there was in it matter pertaining to my subject; the digests I had explored likewise; all the books of every sort available to me, and containing what I deemed useful for my purpose, I had read. The cases I had, not merely examined cursorily; I had read every word of every case, however long, including the statement of the case, and the arguments of counsel when given; I had pondered over every case, not merely while the book was before me, but while I was passing to and fro between my office and my house; while I was reclined on my bed at night, and during the hours by most persons devoted to recreation. I had considered for myself, not only every argument which I had seen in any book, but every one which imagination could bring to me. I found

the law of the subject to be a jumble of the light and the dark in jurisprudence; I found the judges of our country not to have examined it as they have other subjects; I found chaos and confusion, where, if I would succeed in my undertaking, order must arise from beneath my hand."

NOTES.

—A few lawyers find their amusement in the law itself. To a mind excessively dry, the tinge of romance and dramatic interest which professional labor sometimes shows, is recreation enough. These need no other mental pleasures. A book of reports is as good as a novel, a consultation is more sociable than a reception, and a trial far better than a play. Some who are not so dry, but in the other extreme humorous and witty, make amusement at every stage of their work. But most of us need and seek some diversion out of—though often along side of—the path of professional duty. City lawyers are at a disadvantage in this: They can not put a rifle or fowling piece and fishing rod into the wagon, when they start for court, going across the country fifty or a hundred miles, to return by a large circle through half a dozen country towns, nor can they carry on a farm or a garden, and step out of their office between clients' calls to water the horses or gather the apples in the orchard. The amusements of city lawyers are not, perhaps, very amusing. The best are those in which much the same mental abilities are refreshed in an entire change of subjects, or in which physical sports supersede and suspend mental activity. We find one down by the sea shore, building his own cottage—architect, contractor, surveyor and builder, all in one. Another is to be met, with his boys, rambling through the Green Mountains. Here is one who deals in horses for his summer pleasure; another who is a naturalist for the time being; and a third who devotes himself to Cremona and Stradivarius. Winter relaxation is more artificial. It is proverbially hard to find; for the man whose mind is busy in work finds it hard to stop the busy mind with anything less earnest. Horace suffices as a quietus for one; another extends and illustrates Irving's Washington or collects etchings; and a third gets him a lathe or a set of locksmith's or watchmaker's tools. Others, knowing a thing worth two of such sedentary resources, put on the driving gloves or take to the gymnasium and the Turkish bath; while still others, with a greater pride in superior wisdom, open a new box of cigars and lounge away the hours out of office. The best system, for some, at least, is no system at all. Leisure loses, for them, half its charm if it is not leisurely, and work which pays nothing is not attractive either as work or as sport. The one thing in which nearly all agree is, that the law is not quite amusing enough to serve the purposes of amusement for lawyers.—*The Daily Register*.